

IN THE CIRCUIT COURT HELD AT GOASO IN THE AHAFO REGION ON  
TUESDAY THE 5<sup>TH</sup> DAY OF MARCH 2024 BEFORE HIS HONOUR  
CHARLES KWASI ACHEAMPONG ESQ. CIRCUIT COURT JUDGE

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BR/SY/CT/45/2024

THE REPUBLIC

VRS.

1. BERNARD SMITH AKWAFUL
  2. OPOKU STEPHEN
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### JUDGMENT

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It was Prosecution's case that on the 16<sup>th</sup> of May 2022 the police had a tip-off that the accused persons were dealing and selling narcotic drugs at Nkaseim. The police rushed to the scene and found accused persons, who according to prosecution had in their possession certain substances which Prosecution suspected to be narcotic drugs. It was prosecution's case that, in possession of 1<sup>st</sup> Accused person were 181 newspaper wrappers of brown powdery substance, 36 plain polyethylene sachets, 3 yellow paper wrappers of brown powdery substance, 3 yellow paper wraps of white rocky substances while with regards to 2<sup>nd</sup> Accused person Prosecution alleged that 8 small sachet of dried leaves, 32 big sachet of dried leaves in a plain polyethylene and 186 Newspaper wrappers of dried leaves were found in his possession.

From the facts therefore, it becomes quite obvious that Prosecution sought to charge accused persons with the offence of having in possession or control of narcotic drugs for trafficking which is contrary to section 37(1) of the Narcotic Drug Control

Commission Act 2020, (Act 1019). That section provides that;

**“A person who, without lawful authority, proof of which lies on that person, has possession or control of a narcotic drug for use or for trafficking commits an offence”.**

However, on the face of the charge sheet, one observes that Prosecution rather charged accused persons under the section which specifies the punishment for trafficking in narcotic drugs.

That provision is Section 37(2)(b) which provides that;

**“A person who commits an offence in subsection (1)...for trafficking is liable on summary conviction to the fine and imprisonment specified in the Second Schedule and an additional term of imprisonment specified in that Schedule if the fine is not paid”.**

Despite this omission, it is the considered view of the Court that, this does not occasion any miscarriage of justice, neither does it unfairly prejudice the case of the accused persons owing to the fact that the particulars of offence was detailed enough to provide accused persons with all the relevant information necessary for them to know exactly what they had each been respectively charged with. As was held in the case of *The Republic V. Ernest Thompson & 4 ORS (2021) JELR 107960 (SC)*, a charge can be said to have been properly laid, **“...where the particulars of the charge sufficiently inform the accused person of the specific acts and/or omissions that the accused person engaged in which resulted in the event; the reason for which he is being prosecuted”**. In this case as well,

the particulars sufficiently inform accused persons of the act complained of for which they are being prosecuted and as such even though the wrong section was quoted in the particulars of offence, this error was not fatal to Prosecution's case.

Having resolved the preliminary issue, it is essential to note that Prosecution is enjoined by law, particularly, Sections 11(2) and 13(1) of the Evidence Act, 1975 (NRCD 323) to prove the guilt of the accused persons beyond every reasonable doubt. From the wording of Section 37(1) of the Narcotic Drug Control Commission Act 2020, (Act 1019), one observes that the following ingredients must be established by Prosecution beyond reasonable doubt in order to secure a conviction:

- a. The accused had custody or control of the drugs**
- b. He knew of the presence of the drugs ; and**
- c. He knew of the nature of the drugs possessed.**

This thus suggests that apart from proving physical possession, the prosecution must prove legal possession which entails knowledge of the nature of the drugs. [See: The Republic V.

KWABENA GYASI (2015) JELR 66495 (HC)].

Thus in *Ellis Tamakloe V. The Republic* (2010) JELR 68492 (SC) Ansah JSC stated with approval the Ghanaian view on possession of narcotic drugs as expressed by Ollenu JSC in *Amartey v. The State* (1964) GLR 256 at 261 thus:

**"What is the possession proof of which without more makes a person guilty of an offence under the section 47(1) unless he proved that his possession was lawful. Upon a proper construction of the section, the possession must be possession with knowledge of the nature and**

quality of the article; that he possessed awareness that what he possessed is 'opium or Indian hemp'; or residue from the smoking of 'opium or Indian hemp'. Physical possession without that knowledge is no offence. Without that knowledge there is no legal possession which can support the charge. Therefore to succeed on such a charge, the prosecution must prove legal possession; that is in addition to proving physical or constructive possession, they must go further to lead evidence which establishes that the defendant had the requisite knowledge or evidence from which it will be reasonable to presume that the defendant proved to be in possession well knew or ought to have known, that the article he possessed was 'opium or Indian hemp', or was 'residue from smoking of opium or Indian hemp.'"

#### CUSTODY AND CONTROL:

As noticed from the facts proffered by Prosecution, the accused persons are alleged to have had in their possession separate quantities of substances suspected to be narcotic drugs. With regards to 1<sup>st</sup> Accused person, he is alleged to have had in his possession the following;

"181 wraps of cannabis with net volume of 199.10g, quantity of cannabis in a black polyethylene bag with net volume of 285.00g, 36 sachets of cannabis with net volume of 25.09g, 3 yellow wraps of heroin with net volume of 0.1105g, 3 yellow paper wrappers of cocaine with a net volume of 0.0448g, one sachet and 141 pieces of tramadol..."

On his part however, 2<sup>nd</sup> Accused person is alleged to have had in his possession;

“...8 smaller sachet of cannabis with net volume of 149.00g, 32 big sachet of cannabis with net volume of 23.76g and 186 newspaper wrappers of cannabis with net volume of 167.40g...”

The issue which begs for resolution is whether or not accused persons did have in their custody or control the above identified substances. In the course of trial the physical substances were tendered and marked as Exhibits E and F series however, as to whether they were indeed narcotic drugs could not have been ascertained by the Court but for Prosecution’s commendable act of putting into evidence a forensic analysis report of the various substances under scrutiny. The reports were titled „Test Report“ and were tendered and marked as Exhibits A1 and B1. These reports confirmed that the substances in question were indeed narcotic drugs namely, Cannabis, Heroine and Cocaine.

It is very instructive to note that the accused persons neither challenged Prosecution’s witnesses on the nature of the substances nor did they proffer any contrary evidence to suggest that the substances in question were anything other than narcotic drugs. Their failure to so cross examine or deny this rather damning evidence was in fact an admission of the truth of Prosecution’s assertion. Accused is therefore deemed to have admitted the truth of same. (See:Fori v. Ayirebi [1966] GLR 627, SC). This Court accordingly finds that the substances identified which were tendered and marked as Exhibits E and F are in fact narcotic drugs within the meaning of Act 1019.

Were these narcotic drugs found in the custody and control of accused persons? G/Cpl Gyamfi Roger (Pw1) in his evidence in chief was not really clear as to whether the narcotic drugs were found in the possession of accused persons and when this question was put to him by 1<sup>st</sup> Accused person, Pw1 simply stated that he did not know if the items were found in the possession of 1<sup>st</sup> Accused person or not. He was asked by 1<sup>st</sup> Accused person;

**Q. When you arrested me I suggest to you that the items were not in my possession but were in a room?**

**A. I was not part of the arresting officers so I do not know.**

Clearly this answer enured to the benefit of 1<sup>st</sup> accused person in the sense that, a crucial ingredient of the offence was on the brink of not being established by Prosecution. 2<sup>nd</sup> Accused opted not to cross examine Pw1 nevertheless, in the view of the Court, his failure had no adverse effect on his case since Pw1's testimony was not in anyway adverse to 2<sup>nd</sup> Accused person's case.

The testimony of G/Const. Odai Samuel Afotey (Pw2) was rather very informative as it attributed custody and control to each of the accused persons. Pw2 testified to the effect that on the 16<sup>th</sup> of May 2022 while on patrol duties, he had information that some young men were trading in substances suspected to be narcotic drugs so together with other officers they proceeded to Nkasiem and met a number of people buying wraps of suspected narcotic drugs from 1<sup>st</sup> Accused person. Pw2 alleged that he bought three (3) wraps of a suspected narcotic drugs from 1<sup>st</sup> Accused person and when he opened same he realized that it contained dried leaves suspected to be indian hemp at GH¢2.00 each. Consequently, the officers proceeded to arrest 1<sup>st</sup> Accused person. Pw2 further alleged that when further searches were conducted in a polyethylene bag carried by 1<sup>st</sup> Accused person the following items were found;

"181 wraps papers containing dry leaves suspected to be Indian hemp, 144 tramadol capsules, whitish substances in polyethylene bag suspected to be cocaine, three packs of rothman cigarette, a pair of scissors, a jack knife, a lighter, cash the sum of GH¢746.50, 36 smaller sachets each containing substance suspected to be Indian hemp and a smoking pipe".

During cross examination, 1<sup>st</sup> Accused person could not elicit any contradiction from Pw2. In fact, 1<sup>st</sup> Accused person's line of questioning did not only confirm that he had in his custody the narcotic drugs in question, but that he at least attempted to sell same to Pw2. This is what transpired;

Q. I suggest to you that when I was giving you the substance that was when you arrested me but he true owner of same managed to escape? A. Not true.

In other words, 1<sup>st</sup> Accused person admitted that the narcotic drugs were in his possession and he was offering them for sale. In his defence, 1<sup>st</sup> accused person sought to allege that the narcotic drugs did not belong to him. As to whether or not the prohibited drugs belonged to 1<sup>st</sup> Accused person is not of the essence. What is of essence is whether the narcotic drugs were found in his possession and this was duly established by prosecution. It is therefore the finding of the Court that the narcotic drugs attributable to 1<sup>st</sup> Accused person, which were tendered and marked as **Exhibit E** were found in the custody and control of 1<sup>st</sup> Accused person.

With regards to 2<sup>nd</sup> Accused person, Pw2 simply stated in his evidence in chief that;

**“a search also conducted on the polyethylene bag of accused Stephen Opoku also revealed 186 wraps containing leaves suspected to be Indian hemp, six sachets of tramadol capsules, 32 smaller sachets and 8 big sachets all making a total of 40 sachets each containing substances suspected to be Indian hemp and cash the sum of GH¢140.00”**

However it turned out that 2<sup>nd</sup> accused person had no polyethylene bag at the time of his arrest. This was revealed during the cross examination of Pw2 when he conceded that at the time of the arrest of accused persons, 2<sup>nd</sup> Accused person had in his possession only a small wine colour bag. This admission was a

contradiction in the earlier testimony of Pw2 which ultimately affects the veracity and credibility of his claims regarding the contents of the small bag. On the other hand, 2<sup>nd</sup> accused person has since his arrest, through to his prosecution, been consistent on the type of bag he had in his possession and its contents.

In Exhibit D1, the Caution Statement of 2<sup>nd</sup> Accused person, he stated as follows;

“...when I was arrested they found a brown hand bag on me which contained one mobile phone charger, one t-shirt, one...passport...and cash sum of GH¢140.00”.

In his evidence in chief he repeated the same assertion thereby confirming his earlier statement as captured in his caution statement. It is interesting to note that Prosecution itself in the course of tendering the bag found on 2<sup>nd</sup> Accused person sought to identify the items it contained and he stated as follows;

“The bags retrieved have been labeled and one of the bags is labeled with the name of A2. In one of the bags is a smaller brown bag which contains a passport, Ecowas I.D card, charger cable and a jersey”

Clearly, even though Prosecution’s statement was not made under oath, it appears to be a corroboration of 2<sup>nd</sup> accused person’s contention. Consequently, the evidence on record in support and against 2<sup>nd</sup> accused persons alleged possession of narcotic drugs appears to be evenly balanced in the sense that;

- a. There was evidence suggesting that the narcotic drugs were found in the small bag belonging to 2<sup>nd</sup> accused person; and at the same time
- b. There was evidence suggesting that no narcotic drug was found in the small bag belonging to 2<sup>nd</sup> accused person but rather the items found were



a passport, Ecowas I.D card, charger cable, a jersey and an amount of GH¢140.00.

c. It is trite that, where the evidence adduced was evenly balanced in the sense that it was susceptible to two likely explanations, one consistent with guilt, and one with innocence, the Court ought to lean towards that which supports the innocence of the accused person. (See: Tsatsu Tsikata v. The Republic [2003-2004] SCGLR; Kofi alias Buffalo v. The Republic [1987-88] 1 GLR 250; Gyabaah v. The Republic [1984-86] 461 C.A Moshie Alias Adama v. The Republic [1977] 1 GLR 186-190; Apaloo v. The Republic [1975] 1 GLR 156 C.A).

d. Consequently, this Court finds that Prosecution failed to establish custody and control on the part of 2<sup>nd</sup> accused person beyond reasonable doubt. It follows therefore that the entire charge against 2<sup>nd</sup> accused person must fail. 2<sup>nd</sup> accused person is accordingly acquitted and discharged on Count Two.

e. KNOWLEDGE OF THE PRESENCE OF DRUGS:

f. With regards to 1<sup>st</sup> accused person he was found to have had custody and control of the narcotic drugs hence in his case the Court shall proceed to ascertain whether or not he had knowledge of the presence of the drugs.

g. As noted earlier, Pw2 indicated that when he got to the scene he actually interacted with 1<sup>st</sup> Accused person and purchased three wraps of the Indian hemp from 1<sup>st</sup> Accused person at the cost of GH¢2.00 each. This was not denied by 1<sup>st</sup> accused person. In fact, 1<sup>st</sup> accused person alluded to the fact that he was in the process of selling the narcotic drug to Pw2 when he was arrested. The fact that 1<sup>st</sup> accused person was offering the narcotic drugs for sale clearly establishes his knowledge of the presence of the drugs.

h. KNOWLEDGE OF THE NATURE OF THE DRUGS POSSESSED:

Ignorance of the law is not excuse however ignorance of the fact is a very good defence. What this simply means is that, conviction cannot be secured if Prosecution fails to establish that accused person knew that what he had in his possession was a narcotic drug. In the case of *Nyameneba and Others v. The State* [1965] GLR 723, the appellants who were members of a religious sect had been growing "herbs of life" for four years or more. They used the herbs publicly for invocation, at their worship, for food and medicine. Upon report being made to the police against the sect, the police investigated and found the herbs to be Indian hemp. The appellants were tried and convicted under section 49 of the Pharmacy and Drugs Act, 1961 (Act 64). At the trial a chemist certified that the herbs were Indian hemp. On appeal the Supreme Court held, inter alia that, "in a charge of possessing Indian hemp, it is of the essence that the prosecution should prove that the appellants had possession with knowledge", that is knowledge that what the accused possessed was a narcotic drug.

Hence it begs the question whether or not, 1<sup>st</sup> accused person knew that what he was offering for sale to the general public were narcotic drugs?

In the case of *George Bonsu @ Benjillo V. Republic* (1999) JELR

66325, the Supreme Court observed that;

"Knowledge of the nature and quality of the thing possessed being a question of the state of the mind, resort is often had to the circumstances surrounding and the explanations given by the accused, for the possession of the thing in question"

In the instant suit, the circumstances surrounding this case and the explanation given by accused person for his possession raised no plausible defence to the suit. A perusal of his caution statement Exhibit C, was in fact an admission not

only of his possession of narcotic drugs but of his knowledge that the substances he was selling to the public were narcotic drugs. His only defence was that the drugs did not belong to him personally. Even if that was the case, it did not take away the fact that the drugs were found in his possession. Furthermore, the manner in which the drugs were sold ought to have prompted 1<sup>st</sup> accused person that, the product he was selling was not simply toffees or any lawful product. This

Court accordingly finds as established the last element of the offence. Prosecution has therefore proven its case against 1<sup>st</sup> Accused person beyond reasonable doubt. 1<sup>st</sup> Accused is therefore found guilty of the offence and hereby convicted on Count One. He is sentenced to pay a fine ten thousand penalty units and in default three years imprisonment in hard labour. 1<sup>st</sup> Accused person shall further serve a term of imprisonment of 10 years in hard labour.

Given this determination, it is ordered that the narcotic drugs tendered in the course of trial shall be destroyed within 48 hours by the police under the direct supervision of the Registrar of the Court. The sum of GH¢140.00 together with the brown bag and its contents which were in the possession of 2<sup>nd</sup> Accused person shall be released to him forthwith. In the course of trial, it was revealed that contrary to Prosecution's assertion that an amount of GH¢740.50 was retrieved from 1<sup>st</sup> Accused person, it turned out that the actual sum retrieved from him was GH¢851.50 which was tendered and marked as Exhibit G. This sum of money are proceeds from the sale of narcotic drugs by 1<sup>st</sup> Accused person and same hereby confiscated to the state which shall be deposited into the consolidated fund by the Registrar.

**SGD**

**H/H CHARLES KWASI ACHEAMPONG ESQ.**

**CIRCUIT COURT JUDGE – GOASO**

